National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: April 15, 1994

TO: Victoria E. Aguayo, Regional Director, Region 21

FROM: Robert E. Allen, Associate General Counsel, Division of Advice

SUBJECT: Southern California Gas Co. Case 21-CA-29398

177-3925, 512-5006-5040, 518-2001, 518-2017-1400

The Region resubmitted[(1)] this case for advice as to whether the Employer violated Section 8(a)(1), (2), and (5) by announcing the formation of employee participation committees, creating and dominating the employee participation committees, unlawfully imposing unilateral changes, and dealing directly with unit employees. The case was also submitted on whether Section 10(j) relief is warranted.[(2)]

FACTS

During negotiations, the Employer also presented a proposal that the parties create special shop committees to identify projects and related goals, then implement the changes necessary to attain the desired goals. The proposed special shop committees were to be composed of bargaining unit employees involved in the targeted work. The ideas for the selection of goals were to come from employee workshops and "brainstorming."

While the above issues were being discussed at the bargaining table, the Employer issued a memorandum, dated April 8, 1993, to employees in the Engineering and Operations Support Department, to announce a program entitled "Activity Value Analysis Project" (AVA). The memorandum described the AVA project as a way of identifying services of the highest and lowest value to the Employer and its customers to determine which functions should be continued, enhanced, or deleted. The memorandum explained that the study would be conducted in 10 review areas and that each area would be assigned a unit leader. Once the data were collected, the teams would make suggestions for review. At the conclusion of the project, management could determine, as a result of the recommendations of the 10 teams, the impact on individual jobs and work units. Employees were encouraged to become involved and to support this effort.

On April 23, the Employer issued a second memorandum which, inter alia, stated that employees would be asked to participate in the project either by serving on a team or by suggesting ideas to the team.

On May 10, 1993, the Employer held identical meetings during working hours at two different locations and provided employees who attended with transportation. In a packet of documents distributed to employees at the meetings, the Employer stated, inter alia, (1) that staff activities would be grouped into 10 units with each unit having a team to collect and analyze data, assess value, and generate, evaluate and recommend ideas to the steering committee; (2) that the units should consider subcontracting as a way of eliminating some low value Employer activities; and (3) that jobs would most probably be eliminated through the AVA process.

During the meeting, bargaining unit employees were informed that the steering committee would be comprised of managers, supervisors and unit leaders who would evaluate the recommendations of the teams and implement those it decided were appropriate. The managers explained that the purpose of the steering committee would be to eliminate low value activities to assist the management in reaching its goal of 40 percent reduction in the 1993 operating budget. The unit team leaders would present the recommendations of the teams to the steering committee and would be active participants in the decision-making process of the steering committee.

The Employer notified employees that the AVA project had a four-month timetable for generation of ideas and aimed to achieve evaluation and completion of "any organizational changes by year end."

Bargaining unit employees also attended a meeting in which they evaluated their individual job tasks by completing data information sheets which were provided by the AVA team for their particular department. The AVA teams then reviewed the data and assessed which tasks were of low use value to the corporation. Once the teams completed the value assessments, the teams then made suggestions as to how the Employer could continue to provide service, but at reduced costs. Subcontracting was one solution that each team was to consider. The team leaders then took the ideas of the AVA teams to the steering committee.

The Employer states that there were 132 employees who were members of the various[(3)] AVA units; however, the Employer identified only one of the members as a bargaining unit employee. The Employer contends that all but one of the team leaders were supervisors and that none of the team leaders were bargaining unit employees. The Union has offered no evidence to the contrary.

The steering committee, comprised of team leaders, vice presidents and second-level managers, assessed the teams' recommendations, and approved for implementation the ideas most useful in reaching the Employer's goal of reducing the operating budget by the end of fiscal year 1993. The steering committee made the final decisions as to which ideas of the AVA teams the Employer would implement. Some of the ideas generated by the teams and considered and approved by the steering committee related to reduction of work activities for clerical and messenger personnel; reduction of service level of the executive secretarial pool; reduction of training courses; elimination of cross-training, reduction of labor costs by having clerical activities performed by clerical-level employees, reduction of contract labor and streamlining or eliminating unnecessary clerical support functions, among other topics.[(4)]

DISCUSSION

We conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a) (1) by its statements and memorandum announcing the formation of the AVA project committees and Section 8(a)(5) by implementing the memorandum without notice to or input from the Union. We conclude further that the Section 8(a)(2) allegation should be dismissed, absent withdrawal.

Applicable Legal Principles

Section 8(a)(2) provides that it shall be an unfair labor practice for an employer

to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

The threshold question for a determination of whether an employer has violated Section 8(a)(2) is whether the entity involved is a labor organization. In Electromation, Inc.,[(5)] the Board stated that:

the organization at issue is a labor organization if (1) employees participate, (2) the organization exists, at least in part, for the purpose of 'dealing with' employers, and (3) these dealings concern 'conditions of work' or concern other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment. Further, if the organization has as a purpose the representation of employees, it meets the statutory definition of 'employee representation committee or plan' under Section 2(5) and will constitute a labor organization if it also meets the criteria of employee participation and dealing with conditions of work or other statutory subjects.

Thus, if the organization satisfies those criteria, the Board considers whether the employer has engaged in any of the three forms of conduct proscribed by Section 8(a)(2).

Section 8(a)(2)

In the instant case, the Employer contends that only one of the 132 employees participating on a AVA unit team was a bargaining unit employee. Moreover, the Union has failed to present any evidence or witnesses to contest this assertion. Thus, there is no evidence that more than one bargaining unit employee actually participated in the AVA project in any capacity. It appears that if the Employer had actually conducted the AVA project in the manner that it had described the project to the employees through its April 8, 1993 memorandum and the statements made on and literature distributed at the May 10, 1993 meeting, the AVA teams arguably would have been a Section 8(a)(2) union. For example, the Employer informed bargaining unit employees in its May 10 literature that they would generate ideas and make recommendations concerning their job duties which would be for implementation.(6) Such conduct might have met the "dealing with" conditions of work requirement of a Section 2(5) union.(7) However, without evidence that bargaining unit employees actually participated in the AVA program, a critical element -- employee participation -- is missing.(8) Thus, we conclude that the Section 8(a)(2) allegation should be dismissed, absent withdrawal.(9)

Section 8(a)(1) and (5)

We conclude that the Employer violated Section 8(a)(1) and (5) by its April 8 memorandum, statements made at its May 10, 1993 meeting and by the materials distributed to employees at that meeting.

In Modern Merchandising, the Board held that an employer violated Section 8(a)(1) with regard to both union-represented and non-union employees by posting a letter to employees instructing managers to set up a committee comprised of nonmanagement personnel elected by all employees at each store to represent them in making suggestions to the employer regarding working conditions. The Board held that the employer also violated Section 8(a)(5) by preparing, posting, and implementing the letter without notice to or input from the union. The Board also noted that the employer in Modern Merchandising failed to revoke or modify the letter, despite the union's request that it do so.(10) In Firefighters, supra, Board adopted an ALJ's conclusion that an employer violated Section 8(a)(1) when it enlisted the assistance of one of its agents (a supervisor) to create an employee association to negotiate with it over pension benefits, and when the supervisor prepared the association agreement and solicited employees to sign it.

Here, instead of suggesting that employees form committees, the Employer acted directly. Through its April 8, 1993 memorandum, statements at the May 10 meetings and the written materials that it distributed, the Employer informed the employees, about the AVA project, its structure, subjects, and responsibilities. The Employer also stated that the AVA teams would advise the Employer on matters that would affect working conditions, because the AVA teams would consider job functions that could be eliminated or contracted out. If, as an ALJ noted in Firefighters, supra at 870, employer encouragement of employees "to create, or associate themselves into, an entity for collective-bargaining purposes...so interferes with employees' Section 7 rights...as to constitute a violation of Section 8(a)(1),"(11) it follows that the Employer statements that it has created organizations to address terms and conditions of employment and wishes employee participation in those organizations also violates Section 8(a)(1).

Moreover, by bypassing the Union and dealing directly with unit employees by soliciting unit employees' input to the AVA teams about mandatory subjects of bargaining and by dealing with a unit employee on an AVA team about mandatory subjects, the Employer also violated Section 8(a)(5). In this regard, some of the subjects that employees were told that participants in the AVA project would address, including subcontracting of unit work, were also subjects of the Union's negotiations with the Employer. The Union had also proposed to establish a committee composed of unit employees and Union and Employer representatives to discuss ways to increase productivity. The Employer had not responded to this proposal. The establishment and publicizing of a parallel mechanism to solicit unit employee views about their terms and conditions of employment

must inevitably undercut the Union's position as the exclusive collective-bargaining representative of the unit employees. Accordingly, for the same reasons that were set forth in Modern Merchandising, we conclude that the Employer violated Section 8(a)(1) and (5), even though there is no merit to the Section 8(a)(2) allegation.

R.E.A.

[1]Our initial discussion of this case is in Southern California Gas Co., Case 21-CA-29398, Advice Memorandum dated September 22, 1993, where we concluded that the Region should conduct further investigation into the operations of the AVA teams and the steering committee to determine if they are labor organizations under Section 2(5) of the Act.

[2] The need for Section 10(j) relief will be addressed in a separate memorandum.

[3] It is unclear whether 10 or 11 AVA units were established.

[4] It is unclear which proposals relate to bargaining unit positions.

[5] Electromation, 309 NLRB 990, 994 (1992). See generally GC 93-4, "Guideline Memorandum Concerning Electromation, Inc., 309 NLRB No. 163," dated April 15, 1993. See also Research Federal Credit Union, 310 NLRB 56 (1993).

[6] The Employer contends that, in light of E.I. Dupont, 311 NLRB No. 88 (1993), it will limit employee involvement to data gathering and brainstorming and not permit employees to "deal with" the Employer by making recommendations to management. However, there is no evidence that the Employer has disavowed its May 10 statements.

[7] Cabot Carbon, 360 U.S. 203, 211-14 (1958). See, e.g., Ona Corp., 285 NLRB 400, 405 (1987) (employee action committee made proposals regarding vacations and floating holiday schedules); St. Vincent's Hospital, 244 NLRB 84, 85-86 (1979) (employee committee made proposals on several issues including wages, hours and vacations); Ampex Corp., 168 NLRB 742, 746-747 (1967), enfd. 442 F.2d 82 (7th Cir. 1971), cert. denied 404 U.S. 939 (1971) (committee presented suggestions to the employer on behalf of all employees upon subjects pertaining to conditions of work).

[8] The participation of one employee constituted de minimis employee involvement in the AVA program.

[9] See Firefighters, 297 NLRB 865, 870 (1990). The Section 8(a)(2) allegation was dismissed because there was no evidence that a labor organization has been created or that the employer had dominated it. See also Modern Merchandising 284 NLRB 1377, 1379 (1987), where the Board dismissed the Section 8(a)(2) allegation because the General Counsel had failed to present sufficient evidence that the employer actually established the employee "suggestion committees" although it had announced to employees that it intended to establish such committees.

[10] Modern Merchandising, supra, 284 NLRB at 1379-1380. The Board made this finding despite its dismissal of the Section 8(a)(2) allegation.

[11] See also Modern Merchandising, supra at 1378-1380.